

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 01, 2014

RODRICKO O. THOMAS v. JERRY LESTER, WARDEN

**Direct Appeal from the Circuit Court for Lauderdale County
No. 6699 Joseph H. Walker, III, Judge**

No. W2013-02522-CCA-R3-HC - Filed May 23, 2014

The petitioner, Rodricko O. Thomas, filed a petition for habeas corpus relief in the Lauderdale County Circuit Court. The habeas corpus court summarily dismissed the petition for failure to state a basis on which relief could be granted. On appeal, the petitioner challenges the dismissal, contending that the habeas corpus court should have appointed counsel and held a hearing. Upon review, we affirm the judgment of the habeas corpus court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Rodricko O. Thomas, Henning, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; and D. Michael Dunavant, District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that on July 13, 2011, the petitioner entered pleas of nolo contendere on indictment number 10-2240 to aggravated robbery on counts one and two,¹ aggravated burglary on count three, and possession of a firearm during the commission of

¹The original charge on count one was especially aggravated robbery.

a dangerous felony on count four.² The petitioner was sentenced to eight years for each aggravated robbery conviction, three years for the aggravated burglary conviction, and six years for the possession of a firearm conviction. The court ordered the sentences on counts one, two, and three to be served concurrently with each other but consecutively to count four, for a total effective sentence of fourteen years.

Thereafter, on September 26, 2013, the petitioner filed a petition for writ of habeas corpus, alleging, in pertinent part, that his conviction of possession of a firearm during the commission of a dangerous felony was void because the indictment charging that offense failed to specify the predicate dangerous felony. The petitioner attached to his petition the judgments of conviction but did not attach the challenged indictment. The habeas corpus court summarily dismissed the petition, finding that “the petition demonstrates no right to relief.” The petitioner filed a timely notice of appeal challenging the summary dismissal of the petition.

II. Analysis

Initially, we note that the determination of whether to grant habeas corpus relief is a question of law. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007). As such, we will review the trial court’s findings de novo without a presumption of correctness. Id. Moreover, it is the petitioner’s burden to demonstrate, by a preponderance of the evidence, “that the sentence is void or that the confinement is illegal.” Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. See Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). However, “[s]uch relief is available only when it appears from the face of the judgment or the record of the proceedings that a trial court was without jurisdiction to sentence a defendant or that a defendant’s sentence of imprisonment or other restraint has expired.” Wyatt, 24 S.W.3d at 322; see also Tenn. Code Ann. § 29-21-101. In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. Taylor, 995 S.W.2d at 83. “A void judgment ‘is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.’ We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal.” Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting Taylor, 995 S.W.2d at 83).

²The same day, the petitioner entered a plea of nolo contendere to count two of indictment 11-03336, which charged him with robbery. However, none of the petitioner’s issues relate to that charge.

On appeal, the petitioner alleges that the indictment for possession of a firearm during the commission of a dangerous felony failed to specify the underlying felony. Additionally, he contends that the conviction is void because the possession of a firearm during the commission of a dangerous felony was an essential element of the other felonies charged in the indictment, namely aggravated robbery and aggravated burglary.

First, we note that the petitioner pled guilty. Generally, “the voluntary entry of an informed and counseled guilty plea constitutes an admission of all facts necessary to convict and waives all non-jurisdictional defects and constitutional irregularities which may have existed prior to the entry of the guilty plea.” State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999); see also Tenn. R. Crim. P. 12(b)(2); State v. Smith, 996 S.W.2d 845, 846-47 (Tenn. Crim. App. 1999).

Further, Tennessee Code Annotated section 39-17-1324(b) provides that a defendant may not be convicted of employing a firearm during the commission of a dangerous felony “if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged.” We note, however, that aggravated robbery may occur either by an offender committing a robbery with a deadly weapon or displaying any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon, see Tenn. Code Ann. § 39-13-402(a)(1), or by committing a robbery where the victim suffers serious bodily injury, see id. at (a)(2). Aggravated burglary is committed when an offender enters a habitation with intent to commit a felony, theft, or assault or when the offender enters a habitation and commits or attempts to commit a felony, theft, or assault. See Tenn. Code Ann. §§ 39-14-403(a); 39-14-402(a).

The petitioner acknowledges in his reply brief that possession or use of a firearm is not an element of aggravated burglary. He contends, therefore, that “the only predicate dangerous felony upon which the firearms charges could be based is the aggravated burglary.” He further acknowledges that the multi-count indictment alleged aggravated burglary in count three and possession of a firearm during the commission of a dangerous felony in count four; he maintains, however, that the counts “cannot be read together to save the fatally defective omission in count four.”

We note that the petitioner failed to attach to his petition the indictments or a transcript of the guilty plea hearing. Thus, we are unable to discern whether count four actually alleged a predicate felony or whether the aggravated robbery counts alleged the essential element of possession of a firearm. State v. Derron S. Guy, No. W2012-00759-CCA-R3-HC, 2012 WL 5943396, at *2 (Tenn. Crim. App. at Jackson, Nov. 28, 2012). It is well-established that a “petitioner bears the burden of providing an adequate record for summary review of the habeas corpus petition,” including the documents necessary to

support the factual assertions. Summers, 212 S.W.3d at 261. “When [the necessary portions] of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing.” Id. Accordingly, we conclude that the habeas corpus court did not err by summarily dismissing the petition.

III. Conclusion

Therefore, we affirm the judgment of the habeas corpus court.

NORMA McGEE OGLE, JUDGE